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Mar 28.

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 608.

CHESTER A. ARTHUR, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

BENJAMIN HOMER, FRANCIS S. CALLADAY, THOMAS HOMER, GEORGE SIMPSON, AND GUSTAVUS H. SOMMER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 7, 1876.

# SUPREME COURT OF THE UNITED STATES.

## No. 608.

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1 SOUTHERN DISTRICT OF NEW YORK,
*City and County of New York, ss:*

John Lenehan, being duly sworn, says that on the 16 day of October, 1876, he served the within writ of error on Hartley & Coleman, esq's, defendant's attorneys, by leaving a copy thereof with the person in charge of the law-office of said Hartley & Coleman, attorneys, No. 51 William street, in said city.

JOHN LENEHAN.

Sworn to before me this 16 day of Oct., 1876.

J. H. FITCH,
*Notary Public.*

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Benjamin Homer, Francis S. Calladay, Thomas Homer, George Simpson, & Gustavus H. Sommer, pl'ffs, and Chester A. Arthur, defendant, a manifest error hath happened, to the great damage of the said Chester A. Arthur, defendant, as by his complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the part' aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the third Monday of October term, eighteen hundred and seventy-six, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the eleventh day of October, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

The foregoing writ is hereby allowed.

ALEX. S. JOHNSON,
*Cir. J.*

(Indorsed:) U. S. Supreme Court. Chester A. Arthur, plaintiff in error, against Benjamin Homer & als., defendant' in error. Writ of error. Filed Oct. 17, 1876.

3 UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obediance thereto, do hereby certify that the following pages, numbered from four to twenty-five, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Benjamin Homer, Francis T.

Calladay, Thomas Homer, George Simpson, and Gustavus H. Sommer, defendants in error, against Chester A. Arthur, plaintiff in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this first day of November, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the said United States the one hundred and first.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

4 U. S. circuit court for the southern district of New York, in the second circuit.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court-buildings in the city of New York, of the April , 1876, to wit, of the 7th day of October, in the year of our Lord one thousand eight hundred and seventy-six.

Witness the honorable Alexander S. Johnson, one of the judges of the said circuit court.

JOHN I. DAVENPORT, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the 16th day of December, 1874, in October term, A. D. 1874, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court-buildings in the city of New York, came Benjamin Homer & others, by Hartley & Coleman, their attorney', and brought into the said court, before the aforesaid judges thereof, then there, their certain declaration against Chester A. Arthur, defendant, being in custody, &c., of a plea of trespass on the case upon promises; which said declaration follows in these words, that is to say:

5 THE UNITED STATES OF AMERICA:

Circuit court of the United States for the southern district of New York, in the second circuit, of the October term, in the year one thousand eight hundred and seventy-four.

BENJAMIN HOMER, THOMAS HOMER, FRANCIS S. Calladay, George Simpson, & Gustavus H. Sommer, plaintiffs,
*vs.*
CHESTER A. ARTHUR.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The above-named plaintiffs in this suit come into court and, by Hartley & Coleman, their attorneys, give the court now here to be informed that heretofore, to wit, on the seventeenth day of October last past this action was commenced in the supreme court of the city & county of New York, according to the laws of the State of New York, and the rules and practice of said court, in favor of the said plaintiffs against the defendant herein, upon the causes of action hereinafter set forth, and the summons therein filed with the clerk of said court. That the defendant afterwards, by his attorney, George Bliss, esquire, duly ap-

peared in said action, and thereupon, on the fifteenth day of December, in the year one thousand eight hundred and seventy-four, the said action was duly removed by writ of certiorari for further prosecution into this court, according to the act of Congress in such case made and provided; and the clerk of the said supreme court did thereupon return the said writ with the said summons, and duly file the same in this court, which allegations the defendant admits to be true.

Wherefore let the further proceedings and trial in this action be continued in this court.

And the said plaintiffs, by their attorneys, complain of said defendant of a plea of trespass on the case for promises, for that whereas said defendant, on the 17th day of October, eighteen hundred and seventy-four, at New York City, in the district aforesaid, was indebted to said plaintiffs in the sum of three hundred and fifty-five and $\frac{50}{100}$ dollars, lawful money of the United States of America, for duties on merchandise, to wit, manufactures & articles of linen embroidered, imported into and entered at the collection district of the United States for the city of New York, on divers days between the 1st day of February & the 20th day of May, in the year one thousand eight hundred and seventy-four, in the following vessels, to wit, Holsatia, Silesia, Pomerania, Weser, Baltic, Westphalia, from Havre, unlawfully demanded, exacted, and received, at said New York City, by the said defendant, then collector of the customs for said district, under color of a law of the United States for the collection of duties on imports, and paid by the said plaintiffs under protest and appeal, in writing, in due form of law.

And being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money when he, said defendant, should be thereunto afterwards requested.

And whereas, also, the said defendant afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, was indebted to the said plaintiffs in the further sum of five hundred thousand dollars, lawful the United States of America, for money before that time lent and advanced by said plaintiffs to said defendant, and at the special instance and request of the said defendant; and for other money by the said plaintiffs before that time paid, laid out, and expended for the said defendant, and at the like request of the said defendant; and for other money by the said defendant, before that time had and received to and for the use of the said plaintiffs. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when he should be thereunto afterwards requested.

Nevertheless said defendant (although often afterwards requested so to do) has not paid said sums of money, or any or either of them, or any part thereof, to the said plaintiffs; but to pay the same, or any part thereof, to the said plaintiffs has hitherto refused, and still does refuse, to the damage of the said plaintiffs of one thousand dollars, and therefore the said plaintiffs bring suit, &c.

HARTLEY & COLEMAN,
*Attorneys for the Plaintiffs.*

(Indorsed:) U. S. circuit court. Benj. Homer et al. vs. Chester A.

Arthur. Declaration. George Bliss, esq., def't's att'y; Hartley & Coleman, 51 William, attorneys for plaintiffs.

6 *Plea.*

United States circuit court, southern district of New York.

CHESTER A. ARTHUR )
*ads.*
BENJAMIN HOMER & AL. )

And the said defendant, Chester A. Arthur, by George Bliss, his attorney, comes and defends the wrong and injury when, &c., and says that he did not undertake and promise in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendant, and of this he puts himself upon the country, and the said plaintiffs do the like, &c.

GEORGE BLISS,
*Defendant's Attorney.*

To HARTLEY & COLEMAN,
*Plaintiffs' Attorney'.*

7 (Indorsed:) U. S. circuit court. Chester A. Arthur ads. B. Homer & al. Plea. George Bliss, attorney for defendant.

Due service of a copy of the within is hereby admitted.
New York, December 16th, 1874.

You will please take notice that the plea of the defendant in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York.
New York, December 16th, 1874.
Yours, &.,

GEORGE BLISS,
*Defendant's Attorney.*

To HARTLEY & COLEMAN,
*Plaintiffs' Attorney'.*

8 Therefore the issue above joined is ordered to be tried at a circuit court appointed to be held at the United States court-rooms on the 3' Monday of October, A. D. 1875.

And now, to wit, on the 9th day of February, A. D. 1876, being as yet of said October term, before the Hon. William J. Wallace, sitting as circuit judge, come the said parties, by their attorneys, and the said judge, before whom the said issues were tried, hath sent here his record, had before him, in these words, to wit:

Afterward, to wit, on the same day and place, before the said judge, came the plaintiffs and defendant, by their attorneys, and the jurors of the jury also come, to speak the truth in the matter within contained, being duly chosen, tried, and sworn, upon their oath say that said defendant did undertake and promise in matter and form as said plaintiff' have above declared against him, and they assess the damages at three hundred and fifty-five $\frac{50}{100}$ gold dollars, and sixty-seven $\frac{75}{100}$ currency dollars, as interest, coin of the United States, over and above their costs and charges in this suit expended, and for these costs and charges the sum of .

9 Therefore it is considered that the said plaintiffs do recover against the said defendant their said debt, and also for their damages which they have sustained, as well on occasion of the detaining of the said debt, as for their costs and charges by them about their suit in this behalf expended, by the said court now here adjudged to the said plaintiffs, and with their assent; which said debt, damages, costs, and charges in the whole amount to .

And the said defendant in mercy, &c.

Judgment signed this day of , 187 .

*Clerk.*

(Indorsed:) U. S. circuit court. Benjamin Homer et al. vs. Chester A. Arthur. Judgment record. Geo. Bliss, U. S. attorney. Filed Oct. 7th, 1876.

10 *Bill of exceptions.*

Circuit court of the United States, southern district of New York

BENJAMIN HOMER ET ALS.
*ag'st*
CHESTER A. ARTHUR.

Afterwards, to wit, on the 9th and 10th days of February, 1876, at a stated term of this court, begun and holden at New York City, on the third Monday of October, 1875, before the honorable William J. Wallace, district judge, sitting as circuit judge, and duly appointed to hold the same, the issues joined in this cause came on to be tried by a jury duly empanelled and sworn, said plaintiffs being represented by their counsel, Elward Hartley, esq., and the defendant by H. Edwin Tremaine, esq., and in the course of said trial the said counsel for the defendant did take and allege sundry exceptions to the rulings and
11 charges of the court and the refusal of the court to give certain instructions, and submit certain questions to the jury, as then and there prayed for by defendant, which said exceptions are hereinafter severally set forth.

To maintain the issues on the part of plaintiffs, counsel for the plaintiffs proved, among other things, the importations, in 1873, by plaintiffs into the port of New York, at or about the times and by the vessels named in the bill, of particulars of certain merchandize, upon which the plaintiffs had paid to the defendant, as collector of the said port, duties assessed upon said importations, at and after the rate of forty per centum ad valorem.

Upon each of said importations the plaintiffs in due time, after the ascertainment and liquidation of said duties, upon each of plaintiffs' import entries thereof, protested in writing to the said collector, which protests were in form as follows:

12 NEW YORK, *June* 11, 1874.

Hon. CHESTER A. ARTHUR,
*Collector of the Port:*

DEAR SIR: We hereby protest against being compelled to pay 40% (forty per centum) duty on E. H. 1973 linens embroidered, entered by us for consumption May 15, 1874, per st'r Pomerania, from Hamburg, claim-

ing that the said goods are chargeable at 35% under sect. 22, act March 2, '61, and sect. 13, act July 14, 1862, as manf. of cotton, linen, silk, or worsted, if embroidered or tamboured in the loom or otherwise, &c., &c.

We pay the excess exacted under compulsion to get possession of the goods, and will hold you and the government responsible for the return of the same.

Yours, respectfully,

HOMER, CALLADY & CO.
JNO. F. KLUMPF, *Att'y.*

13 The plaintiffs thereafter appealed to the Secretary of the Treasury in due season, who affirmed the said liquidation of the collector, and thereupon this action was brought within the time prescribed by law. The invoices to plaintiffs, upon which they made the said several import entries, by which said duties were liquidated and paid, were put in evidence by the plaintiffs, and upon said invoices the particular goods in question were specified as "polonaise brodee" and "robes brodee," with more or less further description as to color, style, or price. The boxes or cases containing such goods contained several different packages, each one of which in turn included one or more cartons, and the articles in question were packed, each in a separate carton. They are usually imported, bought, sold, and dealt in in this way, and singly, and not by the yard or piece.

14 The plaintiff called witnesses whose testimony, among other things, tended to give further description of the goods, as follows, viz, that they were dress patterns, or patterns for dresses, designed for ladies' wear, each piece, or the contents of each carton, comprising the material for a garment, either as a polonaise (or overskirt) or robe (robes a jour), although not made up. The size of these patterns or articles varied from about eight to twelve yards. About the edge, or above the edge, and arranged so as to form an appropriate ornamentation to the article when made up for wear, there was worked upon it, sometimes in cotton thread and sometimes in linen thread, more or less embroidery. The amount of this embroidery and its elaboration was a substantial and influential element in the cost or value of the articles.

The component material of chief value in the articl's in question as imported was flax or linen, as embroidered, and in the condition in

15 which they were imported, packed in cartons and boxes, the value of the goods exceeded thirty cents per square yard. It appeared that sometimes, though not in this case, in the importation of goods of this character the strips of embroidery were detached from the main body of the article, although packed and sold and imported with it in the same carton.

The testimony further showed that the general descriptive and commercial names of the articles in question were polonais and robes, more particularly described as linen embroidered robes, and linen embroidered polonais, &c.

Upon the package protested against, upon which forty per cent. duty had been assessed and paid, it was proved that if the true duty on the goods was thirty-five per centum ad valorem, $355.50 had been exacted in excess, which sum and interest plaintiffs claimed to recover.

The plaintiffs having rested, the defendant's counsel moved that the court direct the jury to find a verdict for the defendant, and to

16 decide that the plaintiffs had not made out a case of an illegal exaction. The court denied the motion, and defendant's counsel duly excepted.

The defendant's counsel then requested the court to submit all the evidence to the jury, in order that they might determine if the articles in question were manufactures of linen or flax, of which linen or flax was the component material of chief value, and if the jury should determine this question in the affirmative, then they might find a verdict for the defendant. The court declined to submit said question, or to instruct the jury accordingly, and thereupon defendant's counsel duly excepted.

The court then, on motion of plaintiffs' counsel, the defendant having offered no evidence, directed the jury to find a verdict for the plaintiffs, to which direction defendant's counsel also duly excepted.

17 The jury therefore rendered a verdict for the plaintiffs, for three hundred fifty five and $\frac{28}{100}$ dollars principal, in coin, and forty-seven and $\frac{14}{100}$ dollars interest, in currency, and inasmuch as the aforesaid several matters of fact and of law and the said general exceptions do not appear upon the record of said trial, therefore, on the prayer of said defendant, by his counsel, the said judge has signed this bill of exceptions this 24th day of February, 1876, at the October term of said court aforesaid.

WM J. WALLACE,
*U. S. Dist. Judge.*

17½ (Indorsed:) U. S. circuit court, southern district of New York. Benjamin Homer et als. vs. Chester A. Arthur. Copy bill of exceptions. George Bliss, U. S. att'y. Filed M'ch 6, 1876.

18 Supreme Court of the United States, of October term, in the year of our Lord one thousand eight hundred and seventy six.

CHESTER A. ARTHUR, PL'FF IN ERROR
*against*
BENJAMIN HOMER, DEFF'T IN ERROR.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, comes the said Chester A. Arthur, by George Bliss, his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant against the said plaintiff, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff against the said defendant, and the said plaintiff

19 prays that the judgment aforesaid for the error aforesaid and other errors in the record and proceeding aforesaid, as the same appears more fully therein, may be reversed, annulled, and altogether held for nothing, and that he, the plaintiff, may be restored to those thing' which he has lost by reason of the said judgment.

GEORGE BLISS,
*United States Attorney, for the Plaintiff in Error.*

20 SOUTHERN DISTRICT OF NEW YORK,
*City and County of New York, ss:*

John Lenehan, being duly sworn, says that on the 16 day of October, 1876, he served the within citation on Hartley & Coleman, esq's, defendant's attorneys, by leaving a copy thereof with the person in charge of

the law-office of said Hartley & Coleman, attorneys, No. 51 Williams street, in said city.

JOHN LENEHAN.

Sworn to before me this 16 day of Oct., 1876.

J. H. FITCH,
*Notary Public.*

21 UNITED STATES OF AMERICA, *ss:*

To Benjamin Homer, Francis S. Calladay, Thomas Homer, George Simpson, and Gustavus H. Sommer, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the third Monday of October term, eighteen hundred and seventy-six, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Chester A. Arthur is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this eleventh day of October, in the year of our Lord one thousand eight hundred and seventy-six.

ALEX. S. JOHNSON,
*Cir. J.*

(Indorsed:) U. S. Supreme Court. Chester A. Arthur, plaintiff in error, against Benjamin Homer et als., defendants in error. Citation. Filed Oct. 17, 1876.

(Indorsement on cover:) No. 608. Chester A. Arthur, collector of the port of New York, plaintiff in error, vs. Benjamin Homer, Francis S. Calladay, Tho's Homer, George Simpson, & Gustavus H. Sommer. S. New York C. C. U. S. Filed 7th November, 1876.

# In the Supreme Court of the United States.

OCTOBER TERM, 1877.

CHESTER A. ARTHUR, COLLECTOR, &C.,
PLAINTIFF IN ERROR,
*vs.*
BENJAMIN HOMER AND OTHERS.

No. 608.

BRIEF FOR THE PLAINTIFF IN ERROR.

# In the Supreme Court of the United States.

OCTOBER TERM, 1877.

CHESTER A. ARTHUR, COLLECTOR, &c.,
PLAINTIFF IN ERROR,
*vs.*
BENJAMIN HOMER AND OTHERS.
} No. 608.

## BRIEF FOR THE PLAINTIFF IN ERROR.

This was an action to recover an alleged excessive charge for duties upon goods imported in the year 1873.

The bill of exceptions appears upon pages 5, 6, and 7 of the record.

The question is, whether *dress-patterns for ladies wear, not made up, packed for importation separately, and each consisting of from eight to twelve yards—the component material of chief value in which was flax, or linen, as embroidered—worth more than thirty cents per square yard, but bought, sold, and dealt in singly, and not by the yard or piece*, came under the following tariff provision:

"On brown and bleached linens, ducks, canvas, paddings, cotton [cot] bottoms, burlaps, diapers, crash, huckabacks, handkerchiefs, lawns, or other manufactures of

flax, jute, or hemp, or of which flax, jute, or hemp shall be the component material of chief value, not otherwise provided for, valued at thirty cents or less per square yard, thirty-five per centum ad valorem; valued at above thirty cents per square yard, forty per centum ad valorem." Act of 1864, ch. 171, sec. 7 (13 Stat. at L., 209, and see Rev. Stat., p. 465, bottom).

Or under the following:

"Manufactures of cotton, linen, silk, or worsted, if embroidered, or tamboured in the loom, or otherwise, by machinery, or with the needle, or other process, not otherwise provided for, *thirty-five per centum ad valorem*." Acts of 1861, ch. 68, sec. 22, and 1862, ch. 163, sec. 13, (12 Stat. at L., pp. 192 and 557); and see Rev. Stat., p. 479, top).

The Government contended for the former proposition,—the importer for the latter.

For *error*, I assign the following action by the court below:

1. The refusal to leave the above question upon all the evidence to the jury. (Folio 16.)
2. The direction given to the jury to find a verdict for the importer. (*Ibid.*)
3. The judgment given accordingly.

The former provision, quoted from the act of 1864, made part also of the acts of 1861 and 1862, above referred to, and may accordingly be found in 12 Stat., p. 185, last paragraph, and p. 554, fourth paragraph from top. In the last named acts the duty was *thirty* and *thirty-five* per centum *ad valorem*, respectively, *i. e.*, the same laid upon the articles mentioned in the latter provision above quoted. The act of 1864 (above) raised

the duty upon the former class, leaving the latter to the operation of the preceding acts.

In the acts of 1861 and 1862 the provision relied upon by the government *preceded* that relied upon by the importer.

I submit that articles properly termed *manufactures of flax, or of which flax is the component material of chief value*, do not lose their title to be so described under the customs-duties acts by being cut off into lengths of eight or twelve yards and being packed or dealt in severally.

Also, that it is contrary to the whole spirit of the customs-duties laws that the *lower* the state of manufacture in which an article is imported the *higher* shall be the rate of duty imposed thereon; in other words, to apply the principle here, that in the reason and spirit of the tariff laws it is absurd to contend that when manufactures of which flax is the component material of chief value are dutiable at 40 per cent. the same manufactures when also embroidered are dutiable at 35 per cent.

In the same way the meaning as to another material cannot be that *silks* shall pay sixty per cent., unless where *embroidered*, and then only thirty-five per cent. (See Rev. Stat., pp. 472 and 479.)

It seems that nothing but an *express* provision to that effect could establish a scale of duties so exceptional.

Also, that although each of the above provisions is, in form of expression, *residuary* ["not otherwise provided for"], yet the former is to be *satisfied* before effect can be given to the latter.

These are principles of interpretation which in such cases must be resorted to in resolving matters of doubt, or of apparent conflict.

I also submit that the second provision, when read in context, does not apply to articles measured by the square yard; but includes only *such manufactures, &c., as are embroidery.* The gloss put upon the section in the Revised Statutes by prefixing the word "embroidery," adopts this interpretation.

Again, it appears by the record that the goods in question were not *wholly of flax;* whereas, by comparing the wording of the section relied upon by the importer, with many other sections in the tariff laws (see *six* upon the same page, 12 Stat. at L., 557), it will be seen that it includes only manufactures *wholly* of linen, silk, &c., which perhaps confirms the presumption that it includes only *embroidery*, and not *articles embroidered.*

S. F. PHILLIPS,
*Solicitor-General.*

See also rule for interpreting—
"Not otherwise provided for,"
as found in the Act of 1864.
Smythe v. Fiske 23d Wall p. 381.

P. F. McBreen, Law and Job Printer, 14 & 16 Ann St., N. Y.

# U. S. Supreme Court.

CHESTER A. ARTHUR,
*Plaintiff in Error,*
*v.*
BENJAMIN HOMER *et als.*

*October Term*, 1877.—*No.* 608.

## Motion to Dismiss.

We move to dismiss for want of jurisdiction. The record does not show a final judgment in the Court below.

Revised Statutes, section 691.

The paper purporting to be a judgment record is unsigned, and the certificate of the clerk (Appendix A of this brief) shows that the omission was not indadvertent.

## Brief of Defendant in Error on the Merits.

The articles imported are commercially known as embroidered linen robes and polonaises; they are in patterns, and the amount of embroidery is a substantial and influential element in the value of the goods.

Record, page 3.

And the question is whether they are dutiable at 35 per cent. under section 22, Act of March 2, 1861, and amendment (hereinafter cited at length) or at 40 per cent. as "manufactures of flax not otherwise provided for" under the Act of June 30, 1864, section 7, hereafter cited.

The Court below held that they were dutiable at 35 per cent.

## Statutes.

The laws are given in parallel columns, and the parts of the Act of 1864 that are not in the Act of 1861 are italicised for more convenient reference.

ACT MARCH 2, 1861.—SEC. 14. 12 Stats., 185, bottom, and 186, top.

On all brown or bleached linens, ducks, canvas paddings, cot-bottoms, burlaps, drills, coatings, brown Hollands, blay linens, damasks, diapers, crash, huckabacks, handkerchiefs, lawns, or other manufactures of flax, jute, or hemp, [or of which flax, jute, or hemp] shall be the component material of chief value, being of the value of thirty cents and under per square yard, twenty-five per centum ad valorem; valued about [above] thirty cents per square yard, thirty per centum ad valorem; on flax, or linen threads, twine and packthread, and all other manufactures of flax or of which flax shall be the component material of chief value, and not otherwise provided for, thirty per centum ad valorem.

Same act, sec. 22 (12 Stats., 192, middle), imposes duty at 30 per cent. on

"Manufactures of cotton, linen, silk, wool or worsted, if embroidered or tamboured in the loom, or otherwise, by machinery or with the needle, or other process not otherwise provided for."

Act of July 14, 1862, secs. 10 and 13, 12 Stats. 554-557 (both below top), imposes 5 per cent. additional duty on each of the above enumerations tolidem verbis.

ACT JUNE 30, 1864.—SECTION 7. 13 Stats., p. 209 (middle).

On brown and bleached linens, ducks, canvas, paddings, cotton bottoms, burlaps, diapers, crash, huckabacks, handkerchiefs, lawns or other manufactures of flax, jute or hemp, or of which flax, jute or hemp shall be the component material of chief value, not otherwise provided for, valued at thirty cents or less per square yard, thirty-five per centum ad valorem; valued at above thirty cents per square yard, forty per centum ad valorem. *On flax or linen yarn for carpets, not exceeding number eight Lea, and valued at twenty-four cents or less per pound, thirty per centum ad valorem. On flax or linen yarns valued above twenty-four cents per pound, thirty-five per centum ad valorem.* On flax or linen thread, twine and pack thread, and all other manufactures of flax, or of which flax shall be the component material of chief value, not otherwise provided for, forty per centum ad valorem.

Same act, section 22, last proviso, 13 Stats. 216, near bottom :—

"And provided further, that the duties upon all goods, wares and merchandise imported from foreign countries, not provided for in this act, shall be and remain as they were according to existing laws prior to the 29th of April, 1864."

Schedule C, Rev. Stats., pp. 465, 466, contains the entire section from the act of 1864, and Schedule M, Rev. Stats., page 479 (top), the embroidery clauses of the acts of 1861 and 1862.

This is our view of the law also.

## Argument.

### I.

Under the acts of 1861 and 1862, the flax or linen sections and the embroidery sections were both in force, one upon *plain* flax and linen goods, and the other upon manfactures of linen *embroidered*.

### II.

The *flax or linen* section of the act of 1864 does not repeal or effect the *embroidery* sections of the acts of 1861 and 1862.

(*a.*) Repeals of revenue laws by implication are not favored.

U. S. *v.* Tynen, 11 Wallace, 92.
U. S. *v.* 67 Packages, 17 Howard, 85.

"There must be positive repugnancy between the "provisions of the new law and the old to work a "repeal by implication, and even then the old law is "repealed to the extent of such repugnancy."

U. S. *v.* Taylor, Crabbe, 356.
Wood *v.* U. S. 16 Peters, 342.
McCool *v.* Smith, 1 Black., 459.

The two statutes must be so repugnant that they *cannot* stand together.

Morlot *v.* Lawrence, 1 Blatch., 609.
U. S. *v.* Smith, 2 Ibid, 127.

The words "not otherwise provided for," twice repeated in the flax section of the act of 1864, necessarily refer to

articles of flax that *were otherwise provided for*, (e. g.) *embroidered* goods.

In connection with this observe that section 22 of the act of 1864 (above cited) provides that the duties upon all goods not provided for by that act "shall be and remain as they were prior to April 29, 1864."

Duden *v.* Murphy, 18 Internal Rev. Rec., 174.
Jaffray *v.* Murphy, 19 Ibid, 144.

## III.

The 7th section of the act of 1864 upon plain linens, was intended to be a substitute for the plain linen provisions of the acts of 1861 and 1862, and not for the provisions of those acts relative to embroidered goods.

It has no greater scope than the plain linen section of the act of 1861, uses in the main the same phraseology, and does not refer directly or indirectly to *embroidered* goods.

The only new article provided for is flax and linen yarn, which in the former acts fell under the clause for "manufactures of flax not otherwise provided for." In other respects it is less comprehensive than the former plain linen acts. "Drills, coatings, brown Hollands, play linens and damasks" are named in the acts of 1861 and 1862, but not in the act of 1864. The words "not otherwise provided for," in the first clause of the act of 1864, are not in the acts of 1861 and 1862, and the reason for their insertion is explained in Point II.

The enumerations of the plain flax and linen sections of the acts of 1861, 1862 and 1864 are otherwise *totidem verbis*.

And consequently under the general rules of construction and the terms of the proviso to section 22 of the act of

1864, (above cited) the duties on *embroidered* linens remained "as they were prior to April 29, 1864."

As the language of the acts of 1861 and 1862 in their *plain flax* sections is substantially reproduced in the *flax* section of 1864, and as only *plain* flax goods are named therein, the intent must be to provide for plain flax goods only. The *embroidery* section remained as it was. It was not specially repealed, nor was there in the statute evidence of any *design* to repeal it; but there is an intent apparent by the terms of the proviso to section 22, that it "should remain as it was."

The flax section of the act of 1864, being a substitute for the corresponding sections of the act of 1861 and 1862, can only cover the same class of goods.

"It is not to be presumed that Congress when it sub-"stitutes the provisions of one tariff act for another "intends to use terms in a different sense from that in "which they were used in the prior act."

Roosevelt *v.* Maxwell, 3 Blatch., 391.
Reiche *v.* Smythe, 13 Wallace, 162.

## IV.

Duty is laid in the sections upon *embroidered* goods, on "manufactures of cotton, linen or silk, *if embroidered.*"

The test of the duty is whether they *are embroidered.* Plain linen goods fall under the flax section of the act of 1864, but if embroidered they fall under the *embroidered* clause.

These goods are embroidered, and in the language of the record (fol. 14) "the amount of this embroidery and its

elaboration was a substantial and influential element in the cost and value of the articles." Their value and their commercial character is derived from the embroidery and not the material. Therefore, Congress thought that a different rate of duty should be imposed on embroidered linens.

The goods are not "manufactures of *flax* not otherwise provided for," but "articles of *linen* embroidered;" in other words, they are manufactures of *linen*, manufactured beyond plain flaxen goods by being embroidered.

## V.

Our view is that of the revisers. In the Revision of the Statutes, the embroidery clause appears as part of the law.

Schedule M, Revised Statutes, page 479, top.

The flax clauses of the act of 1864 also appear unaltered.

Schedule C, Revised Statutes, pages 465, 466.

The law as compiled by the revisers embraces all statutes in force on December 1, 1873.

Revised Statutes, Section 5595.

## VI.

There was no error in the refusal of the Court to submit the case to the jury. There was no question of fact in dispute.

Record, folios 11 to 16.

The only question was one of law. The goods imported being manufactures of linen *embroidered*, the jury were not entitled to find that they were in a tariff sense dutiable as "manufactures of flax not otherwise provided for," but it was for the Court as matter of law on the undisputed facts to say under which of the two statutes in controversy the duty should be levied. And under the evidence and the law it would have been error for the Court to have instructed the jury otherwise than to find for plaintiffs.

Arthur *v.* Cummings, 1 Otto, 365.
Schuckardt *v.* Allen, 1 Wallace, 359.
Tolland *v.* Sprague, 12 Peters, 336, (middle.)

EDWARD HARTLEY,
*Counsel for Defts. in Error.*

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## Appendix A.

CIRCUIT COURT OF THE UNITED STATES.

SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN HOMER *et al.*
*vs.*
CHESTER A. ARTHUR.

I, John I. Davenport, Clerk of the Circuit Court of the United States for the Southern District of New York, do hereby certify that the records of my office show that on the 10th day of February, A. D., 1876, the plaintiffs in

the above entitled action recovered of the above-named defendant a verdict for the sum of three hundred and fifty-five dollars and fifty cents in gold coin of the United States and forty-seven dollars and seventy-five cents in lawful money of the United States.

I further certify that on the 7th day of October, A. D., 1876, the attorney for the defendant, presented to me what purported to be a judgment roll in said action with a request that I sign the same and enter judgment thereupon which request was then and there refused. The said paper purporting to be such judgment roll was then and there, by said attorney for defendant, filed in my office.

I further certify that on the 11th day of October, A. D., 1876, a writ of error was sued out by the defendant, and on the 17th day of October, 1876, the said writ of error and citation was filed in my office.

I further certify that in obedience to said writ of error I did on the 11th day of November, A. D., 1876, transmit my return on said writ to the Supreme Court of the United States.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said Circuit Court this fifteenth day of March, A. D., 1878.

[SEAL.]

(Signed.) JOHN I. DAVENPORT,
*Clerk.*

Embroidered manufactures of linen
9% of 40 p.c. or of 35% p.c